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Imagine a nuclear power plant situated near an urban center. In the event of a nuclear accident, a radiation leak could increase the risk of cancer to the city's inhabitants a hundred-fold. Suppose further that the engineer supervising radiation containment has been found drunk at the control panel. The engineer is immediately discharged by the utility company. Pursuant to a collective bargaining agreement, the engineer's union brings a grievance concerning the firing to arbitration. After hearing testimony from fellow employees that the engineer has had a drinking problem for several years, the arbitrator, having been assured by the engineer that he is truly sorry and will never drink again, decides that discharge is too severe a sanction and orders the utility company to reinstate the engineer. Under current standards of judicial deference to labor arbitration awards, no court would be able review this arbitrator's questionable judgment.

Arbitrators make crucial reinstatement decisions in several modern industries that, by the nature of their operations, pose a risk to the health and safety of the general public. Companies engaged in the energy, transportation and health industries, for example, have a responsibility to minimize this risk through careful monitoring of employees who work in potentially hazard-creating jobs. When such an employee's actions are either reckless or impaired by substance abuse, and consequently endanger the public, it is sensible for a company to discharge that employee to protect the public, deter similar acts and minimize exposure to tort liability. It is not certain, however, that the discharge of a potentially dangerous employee will be upheld in grievance arbitration.

Some arbitrators see discharge as an extreme sanction and tend to avoid this penalty where possible. For example, if an arbitrator feels that a reckless employee may be deterred from future dangerous activity by a lesser sanction, he or she may, after taking into account the time it took to process the grievance through arbi-

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tration, order reinstatement after a short suspension. Similarly, an arbitrator may order reinstatement of a substance-abusing employee who has undergone some degree of rehabilitation. Under current law, an arbitrator's decision to reinstate a once-dangerous employee is final and binding unless it can be shown that the award directly contravenes public policy.[1]

Some federal courts have declined to enforce arbitrators' decisions reinstating employees discharged for endangering the public. These courts have held that any reinstatement of an employee who has seriously placed the public at risk violates public policy. Such a conclusion may be questionable if the arbitrator has correctly determined that a specific sanction or rehabilitation program will successfully prevent the employee from dangerous acts in the future; in such a case, reinstatement could not possibly violate public policy. On the other hand, if the arbitrator's opinion is erroneously based on insufficient information about whether the specific sanction or rehabilitation program will ensure that the employee will act responsibly and safely in the future, then returning that employee to his or her former job may actually increase the danger to public health and safety.

For a court to ascertain accurately whether a specific award violates public policy, it must evaluate the specific grounds upon which the arbitrator based the reinstatement decision. Unfortunately, consonant with the long-standing policy of strict deference to labor arbitration awards, an arbitrator need not deliver an opinion or support an award with evidence or defined reasoning.[2] As a consequence, courts have no method for distinguishing awards that endanger the public from those that do not, and must defer to the arbitrator's discretion.

While strict deference to an arbitrator's decisions relating to industrial matters is generally appropriate since arbitrators are presumably chosen for their expertise in a specific industry, it is uncertain whether this expertise necessarily extends to decisions about effective punishments or rehabilitation programs. When the health and safety of the public is at issue, it is inappropriate for a court to blindly enforce an unsupported award.

This Comment argues that although strict deference to labor arbitration awards is appropriate for problems arising in the industrial context, when substantial public health and safety interests are at stake, deference should not be given unless the record

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[1] See text accompanying notes 19-45.

[2] See text accompanying notes 12-14.

clearly supports the arbitrator's determination that reinstatement will not endanger public safety. A reinstatement award based solely upon an arbitrator's good faith belief that the employee will act responsibly in the future is an insufficient protection for the public. Additionally, in instances of on-the-job substance abuse, an arbitrator's award should provide a mechanism for monitoring the employee's rehabilitation.

Part I of this Comment reviews the rationales underlying the thirty-year-old doctrine of judicial deference to labor arbitration. Part II discusses the public policy exception to the general rule of deference. Part III examines three recent cases in which the federal courts have disagreed over whether arbitral reinstatement of employees discharged for endangering the public contravenes public policy. Part IV argues that the rule of strict deference should be modified in cases where an employee's misconduct has placed the public in a significant degree of danger.

I. RATIONALES FOR JUDICIAL DEFERENCE TO ARBITRATION

Three decades ago, the Supreme Court indicated its agreement with Congress's preference for labor arbitration[3] in the *Steelworkers Trilogy*.[4] In essence, the *Trilogy* holds that when a collective bargaining agreement contains an arbitration clause, every claim covered by that clause must be arbitrated, whether or not a court might believe the claim to be frivolous.[5] All grievances not specifically excluded from the scope of an arbitration clause are

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[3] See Labor Management Relations Act ("LMRA") § 203(d), 29 USC § 173(d) (1982) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.").

[4] The *Steelworkers Trilogy* is the popular name for three opinions on labor arbitration written by Justice Douglas and handed down on June 20, 1960: *United Steelworkers v American Mfg. Co.*, 363 US 564 (1960); *United Steelworkers v Warrior & Gulf Navigation Co.*, 363 US 574 (1960); and *United Steelworkers v Enterprise Wheel & Car Corp.*, 363 US 593 (1960). The Court recently and unequivocally reaffirmed its adherence to the *Trilogy*:

> The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the Steelworkers Trilogy. These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

AT&T Technologies v Communications Workers, 475 US 643, 648 (1986).

[5] *American Mfg.*, 363 US at 568-69.

presumed to be covered.[6] So long as the award is based on the contract, it is final, binding, and may not be reviewed by any court unless contrary to external law.[7] Judicial deference is appropriate because the parties bargained for an arbitrator to interpret the collective bargaining agreement.[8] Consequently, an arbitration award is seen either as a part of the contract or as a binding interpretation of it.

Because maximum industrial efficiency depends not only on a fair interpretation of the contract, but also on an interpretation founded in the specific needs of the industry, the best interpreter is an arbitrator with expertise in a particular field of business. The *Trilogy*, in perhaps a somewhat romanticized view, envisions an arbitrator who is an expert, well versed in the "industrial common law—the practices of the industry and the shop."[9] A court, on the other hand, is less competent to make the type of business judgments required to maximize productivity:

> The parties expect that [an arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[10]

An arbitrator's superior competence is not guaranteed merely because she is selected by parties, who have a stake in the outcome and are best situated to evaluate her credentials. However, it is reasonable for a court to assume that the chosen arbitrator will be the best available under the circumstances. A private arbitrator may have access to information about all aspects of the industry.

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[6] *Warrior & Gulf*, 363 US at 584-85.
[7] *Enterprise Wheel*, 363 US at 599.
[8] Id.
[9] *Warrior & Gulf*, 363 US at 581-82.
[10] Id at 582.

Unlike a court's, an arbitrator's inquiry is not restricted to the facts of a particular dispute, and the decision may incorporate tangential industrial knowledge.

Arbitration may also promote industrial peace. An arbitration clause is commonly bargained for in exchange for a no-strike clause. Because labor makes a promise to refrain from wildcat strikes so long as grievances are taken to arbitration, any intervention by a court into this process might cause an increase in strikes and work stoppages. For this reason, combining an arbitration clause with a no-strike clause is an effective way of achieving federally-mandated industrial stabilization.[11] Since a strike may stop production, the industrial peace rationale mirrors the arbitral competency rationale: both focus on increased productivity through an inexpensive and relatively swift process for resolution of labor disputes.

In sum, the benefits of enhanced productivity, industrial stability and adjudicatory efficiency require strict deference by courts to arbitration awards. Courts must refuse to review the merits of an award.[12] According to the *Trilogy*, this is true even when the arbitral opinion is ambiguous or does not explain the reasons for the award.[13] Justice Douglas reasoned in *Enterprise Wheel*, one of the *Trilogy* cases, that to require clear opinions would cause arbitrators to "play it safe by writing no supporting opinions."[14]

A principled limit on the scope of labor arbitration is that an award is "legitimate only so long as it draws its essence from the collective bargaining agreement."[15] An arbitrator "does not sit to dispense his own brand of industrial justice."[16] An arbitrator cannot use specialized knowledge to fashion awards that are not grounded in the specific provisions of the collective bargaining

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[11] *Warrior & Gulf*, 363 US at 578 n 4 (citing *Textile Workers Union v Lincoln Mills*, 353 US 448, 455 (1957)).

[12] *Enterprise Wheel*, 363 US at 596.

[13] Id at 598.

[14] Id. Perhaps Justice Douglas did not envision a case where an arbitrator's award was not limited to the industrial arena and could significantly impact on public welfare. This Comment agrees that the practice of not requiring a clear, unambiguous award is appropriate where an arbitrator has industrial expertise, but argues that where an arbitrator is not an expert and an award will potentially impair public health and safety, it would not be unreasonable for a court to require that the award be grounded in fact. If an arbitrator has no special expertise in drug rehabilitation, for example, it would be appropriate to bring in an expert on rehabilitation programs who could accurately assess the probability of recidivism. Only after such an assessment could an arbitrator, and subsequently a court, know the degree of risk that a reinstated employee could pose to the public.

[15] Id at 597.

[16] Id.

agreement. This limitation is, however, open-ended. Many explicit contractual provisions, such as one allowing discharge only for "just cause," are inherently ambiguous. Since an issue is presumed to be arbitrable unless specifically excluded from the contract,[17] there will be many issues decided by an arbitrator that have no foundation in the text of the contract. As a result, some reviewing courts have exercised broad discretion in determining whether an arbitrator has gone beyond the implied contractual boundaries. Criticizing cases where courts have found contractual grounds to overturn an arbitration award, Judge Reinhardt argues that the only time courts invoke the "essence from the collective bargaining agreement" language is when they want to "dispense their own brand of industrial justice."[18]

In practice, relatively few courts overturn awards as being outside the bounds of the contract. For three decades, the policy of strict deference to labor awards has allowed arbitrators wide discretion in adjudicating labor grievances. Only public policy concerns and standard contractual principles have operated as a check on arbitral power.

II. THE PUBLIC POLICY EXCEPTION

In 1983, the Supreme Court, in *W.R. Grace & Co. v Local 759*,[19] acknowledged that an arbitration award might be denied enforcement if it violated public policy. Because of the inherent ambiguity of the term "public policy," this exception to the general rule of strict deference has been the subject of continuing controversy.[20] It has been on public policy grounds that employers seeking to uphold discharges of public-endangering employees have argued that reinstatement is improper. It is important, therefore, to examine the development of the public policy exception, first defined in *Grace* and amplified in *United Paperworkers Interna-*

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[17] *AT&T*, 475 US at 650 (citing *Warrior & Gulf*, 363 US at 582-83).

[18] Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, 40 Natl Acad Arb Ann Mtg 25, 33 (BNA 1987).

[19] 461 US 757 (1983).

[20] See Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chi Kent L Rev 3 (1988); Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving* Grace *in the Search for a Well-Defined Public Policy Exception*, 42 U Miami L Rev 767 (1988).

tional Union v Misco, Inc.,[21] before turning to more recent public safety discharge cases implicating this standard.[22]

In *Grace*, an employer had signed a conciliation agreement with the Equal Employment Opportunity Commission ("EEOC") to avoid Title VII liability for discrimination in the hiring of blacks and women. The company argued that a subsequent arbitration award ordering damages to laid-off white males violated public policy. The Supreme Court rejected this argument, holding the company liable for its obligations under the pre-existing collective bargaining agreement in spite of a judicial order enforcing the EEOC conciliation agreement. The Court held that since an award of damages rather than specific performance did not require violating the judicial order, it did not violate the public policy against violating judicial orders.[23] The Court did not allow the company to shift the loss to the employees, especially since the company did not involve the union in the conciliation process.[24]

In the course of its opinion, the Court stated it would deny enforcement of an arbitration award that directly contravened public policy:

> As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . [T]he question of public policy is ultimately one for resolution by the courts. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[25]

Even though W.R. Grace's public policy argument failed, the Court left the door open. Subsequently, companies invoked *Grace* in support of arguments that arbitral reinstatements of discharged employees violated various public policies.[26] Lower courts split in

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[21] 484 US 29 (1987).

[22] See part III.

[23] *Grace*, 461 US at 769. Note that in *Misco* the Court stated that two public policies were involved in *Grace*: "[1] obedience to judicial orders and [2] voluntary compliance with Title VII." *Misco*, 484 US at 43.

[24] Id at 770.

[25] Id at 766 (quoting *Muschany v United States*, 324 US 49, 65-66 (1945)) (citations omitted).

[26] See, for example, *United States Postal Service v American Postal Workers Union*, 736 F2d 822, 824 (1st Cir 1984) (public policy against embezzlement of government funds); *Amalgamated Meat Cutters v Great Western Food Co.*, 712 F2d 122, 125 (5th Cir 1983) (public policy against drunk driving by truckers while on duty).

their interpretation of what constituted a proper public policy. Some judges adopted a broad view and suggested, for example, that a public policy against embezzlement of postal funds was sufficient.[27] Others argued, adopting what Professor Meltzer has called the "limitist" view,[28] that an award need violate "positive law" in order to come under the exception.[29]

In an effort to clarify the public policy exception, the Supreme Court granted certiorari in *Misco*. There, an arbitrator reinstated the operator of a hazardous machine who had been discharged for allegedly possessing marijuana on company property. The arbitrator refused to consider evidence that had come to light after the company had discharged the employee. In challenging the award, the company argued that reinstatement was contrary to public policy. This argument prevailed in the district court, and the Fifth Circuit affirmed, ruling that the relevant public policy was one against "operation of dangerous machinery under the influence of drugs or alcohol."[30]

The Supreme Court reversed, emphasizing that an arbitrator's finding of fact and determination of remedies should stand unless tainted by fraud or dishonesty.[31] Writing for a unanimous Court, Justice White stated that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed *serious error* does not suffice to overturn his decision."[32] The Court reasoned that protection of "speedy resolution of grievances by private mechanisms" requires the strictest deference.[33] Even if the factfinding of an arbitrator is patently "silly," such facts are not to be reviewed by a court.[34] Unless the parties limit the arbitrator's discretion by contract, it is properly within his or her discretion to reject or modify a sanction imposed by management.[35] Should an arbitrator misread a contract and, as a consequence, improperly modify a company sanction, a court's proper role is not to vacate the award but to remand the case to the arbitrator for a definitive

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[27] See *American Postal Workers*, 736 F2d at 826.

[28] See Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 Ind Rel Law J 241, 242 (1988).

[29] See, for example, *E. I. DuPont de Nemours and Co. v Grasselli Employees Independent Ass'n*, 790 F2d 611, 620 (7th Cir 1986) (Easterbrook concurring).

[30] *Misco*, 484 US at 35.

[31] Id at 38.

[32] Id (emphasis added).

[33] Id.

[34] Id at 39.

[35] Id at 41 (citing *Enterprise Wheel*, 363 US at 597).

construction of the contract.[36] Thus, under *Misco*, it is clear that the determination of both facts and remedies are to be left to the arbitrator.

Addressing Misco's public policy argument, the Court reaffirmed *Grace*, holding that common law principles prevent a court from enforcing any contract violating law or public policy.[37] This doctrine is "justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements."[38] Thus, one key element in determining whether a contract has violated a public policy is finding a public interest that must be protected. A second required element is whether a policy protecting this interest can be found in either positive law or legal precedent.[39] It should be noted that a court's function is not merely to declare whether an arbitrator's award is proper; if it finds no fraud, self-dealing or manifest disregard for the contract, it must enforce an award unless it would be contrary to a clearly defined public policy. Although the Court in both *Grace* and *Misco* was silent on the question of precisely where a court should find sufficient legal precedents, it clearly stated that a court cannot look to "general considerations of supposed public interests."[40]

Once a distinct public policy is found, the reviewing court must decide whether the award explicitly conflicts with the relevant public policy.[41] The award must be examined to see whether enforcement of the award would actually, not speculatively, violate that policy.[42] *Misco* also emphasizes that an arbitrator may disagree with a company's sanction for employee misconduct and that the judgment of the arbitrator is especially important in formulating remedies.[43]

By requiring that an award explicitly conflict with public policy before it is overturned, *Misco* prevents a court from substituting its judgment even when it believes that a particular sanction may be insufficient to ensure that the past objectionable conduct

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[36] *Misco*, 484 US at 42.

[37] Id at 42.

[38] Id.

[39] *Grace*, 461 US at 766.

[40] Id.

[41] *Misco*, 484 US at 43.

[42] Id at 44 ("A refusal to enforce an award must rest on more than speculation or assumption.").

[43] Id at 41.

of an employee will not be repeated. Under *Misco*, for example, a court is not able to overrule an arbitrator's determination that the grievance arbitration process will reform an employee who has acted contrary to public policy. This determination might even be implied, because under the *Trilogy* an arbitrator is not required to write a clear opinion.[44] If discharge is predicated on a violation of public policy, then any arbitral reinstatement may be presumed to include a sanction based on a finding of the employee's amenability to discipline; under *Misco*, this implied finding is an unreviewable determination of fact.[45]

It is this extreme degree of deference to reinstatement that is at the heart of the public safety dilemma. When an employee's act substantially endangers the public, it should not be difficult for a court to find a well-defined and dominant public policy against such an act. The rationale of the public policy exception, as stated in *Misco*, is that courts best protect public interests that conflict with a private agreement.[46] Yet when it is conceivable that an employee will be deterred from future dangerous acts, an arbitrator, acting under few legal restraints, is given almost unlimited power to decide how the public will be protected.

III. Public Safety Applications of the Public Policy Exception

Some courts have overturned arbitral awards, imposing minor, if any, sanctions on employees who have substantially endangered the public. Plainly, the intention of these courts has been to protect the public. This intention is consistent with the spirit of the public policy exception, but seems to conflict with the Supreme Court's insistence that remedial discretion be left in the hands of an arbitrator.

Courts applying *Misco* have viewed the public policy exception in two ways, neither of which is completely satisfactory. The first view, a broad interpretation of *Misco*, looks to the employee's conduct that led to the discharge: if that conduct violated public pol-

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[44] See text accompanying notes 12-14.

[45] See *Misco*, 484 US at 44-45:

> To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding about Cooper's use of drugs and his *amenability to discipline*, a task that exceeds the authority of a court asked to overturn an arbitration award.

(Emphasis added.)

[46] Id at 42.

icy, then the resolution of the grievance should be left to the judiciary. Although producing desirable results where public safety is at issue, the broad view misapplies *Misco* because it gives little or no weight to the requirement of strict deference to arbitral remedies. The broad view also places undue emphasis on the original safety violation rather than on the public policy implications of the reinstatement decision. According to the other view, a narrow interpretation of *Misco*, an award must on its face violate positive law or a well-defined public policy for it to be overturned. The problem with the narrow view is that it requires a court to enforce an arbitration award even when there is a significant possibility that the reinstated employee will continue to pose a threat to public health and safety.

A. The Broad View

In a case involving the containment of radiation in a nuclear power plant, *Iowa Electric Light & Power v Local Union 204*,[47] the Eighth Circuit ignored an arbitral finding and affirmed a district court ruling overturning the reinstatement of a machinist who had violated a plant safety rule. The reactor building, in which the machinist worked, required pressurization to prevent leakage of radiation; the pressure was maintained by interlock doors, designed to be opened one at a time. Partially immobilized by a leg cast, the machinist preferred to get to lunch before the noon crowd. One day, shortly before noon, he found the door leading out of the pressurized area locked shut. When he learned the door was locked because another door on the network was blocked by a truck, he requested permission from the control room engineer to defeat the interlock system. His request was denied. Not one to give up easily, he asked the foreman outside the door to pull the interlock fuse. The foreman complied and the machinist made it to an early lunch; his unorthodox method for doing so, however, cost him his job.[48]

The electric company fired the machinist for "violating secondary containment."[49] The discharge was subsequently approved in a Nuclear Regulatory Commission ("NRC") report. The union filed a grievance and, pursuant to the collective bargaining agreement, the issue of "just cause" for the discharge was brought

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[47] 834 F2d 1424 (8th Cir 1987).

[48] Id at 1425-26.

[49] Id at 1426. Secondary containment is a buffer zone around the perimeter of the primary area located at the core of the reactor.

before an arbitrator. The arbitrator found that summary discharge was "too severe" a penalty under the circumstances and ordered the company to reinstate the machinist, even though the arbitrator also found the employee's actions "deliberate, improper, foolish and thoughtless."[50] According to the arbitrator, mitigating circumstances existed: the machinist was not aware that defeating the interlock doors was as serious a matter as the company claimed. Inconsistently, the arbitrator also noted that the purpose of the interlock system was "well known" and that the "grievant was fully aware he was not to disable the door."[51] The absurdity of finding the machinist unaware of the gravity of his act was amplified by the fact that he had attended and passed several courses that discussed the importance of radiation containment.[52]

The Eighth Circuit agreed with the district court that enforcement of the award reinstating the machinist would violate the "public policy of this nation concerning strict compliance with safety regulations at nuclear facilities."[53] To illustrate the well-defined and dominant nature of this public policy the court referred first to NRC safety rules and then to Supreme Court dicta concerning the public's interest in the safe operation of nuclear plants.[54]

The court held that the machinist was "no longer to be trusted to work in such a critical environment when he shows no respect for the safety implications of his actions and when he is willing to jeopardize the safety of the public."[55] The court went on to explain:

> Our holding today should not be read as a blanket justification for the discharge of every employee who breaches a public safety regulation at a nuclear power plant. There may be circumstances under which a violation might be excused. But in this case, [the machinist's] violation of the safety rule was serious.[56]

Thus the gravity of the violation of the rule requiring containment was dispositive.

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[50] *Iowa Electric*, 834 F2d at 1424.

[51] Id.

[52] Id at 1429.

[53] Id at 1426.

[54] Id at 1428.

[55] Id at 1429 (citing *Iowa Electric Light and Power v Local Union 204*, Nos C85-0135 and C85-0137, slip op at 18 (ND Iowa, March 11, 1987)).

[56] Id (footnote omitted).

While this may seem a sensible outcome in light of public safety, it ignores the arbitrator's substantive determination that just cause required that the employee have knowledge of the seriousness of the rule.[57] Iowa Electric could certainly have specified in its contract with the employees that a single violation of an NRC safety standard would constitute just cause for discharge, regardless of the employee's knowledge of the seriousness of that standard. One must ask, however, why the arbitrator did not consider the machinist's lack of knowledge as an indication of the danger he posed to the community.

Another example of a lower court taking an overly broad view of *Misco* occurred in 1988. The Eleventh Circuit, relying in part on *Iowa Electric*, upheld a district court's decision overturning the reinstatement of an airline pilot who flew while intoxicated. In *Delta Air Lines v Air Line Pilots Association*,[58] the pilot of a passenger airliner spent a scheduled layover in Bangor, Maine with other crew members and flight attendants. During the course of the evening, the pilot allegedly consumed three beers, shared three carafes of wine, drank a "nightcap," accepted a stranger's offer to buy him drink, and then, after "blacking out" at 10:00 p.m., switched to scotch, which he drank until he retired at 12:30 a.m. He arrived at the aircraft the next morning with a red face, glassy eyes and alcohol on his breath. The flight attendants voiced concerns about his ability to fly the plane, but the crew protected him and he flew the entire trip to Boston. After the plane landed, the flight attendants reported the pilot to Delta's chief pilot. The pilot's intoxication had been so obvious that it also caused a passenger to make a report to the airline's customer service department. The chief pilot subsequently ordered the entire flight crew to take blood alcohol tests, which showed that only the pilot had been legally intoxicated

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[57] In a similar vein, the arbitrator in *Misco* found there was not just cause when the company discharged an employee prior to having conclusive evidence of his possession of marijuana on company premises. Evidence that surfaced after the date of discharge was held by the arbitrator to be an insufficient basis for discharge. *Misco*, 484 US at 35. The Court observed that "[t]he parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose." Id at 39. Even though *Misco* dealt with a procedural issue while *Iowa Electric* was concerned with a substantive issue, the respective standards of evidence and knowledge used by the arbitrators are reflected in common law. Since neither collective bargaining agreement specified different standards, neither arbitrator can rightly be accused of having detoured from authority under the contract.

[58] 861 F2d 665 (11th Cir 1988).

at the time of the flight. Five days later, the airline discharged the pilot.[59]

After its grievance was denied, the union submitted the dispute before a five-member arbitration board. The board found that there was not just cause for the discharge. The board reasoned that since on prior occasions intoxicated employees had been offered an opportunity to enter a rehabilitation program, Delta should have offered a similar program in this instance. The board noted that after the pilot had been discharged, he was diagnosed as an alcoholic, and had entered a rehabilitation program on his own accord. Since the board found this rehabilitation sufficient, it ordered reinstatement without back pay. In addition, the company was ordered to pay for the cost of the alcohol treatment program.[60] The district court set aside the award as violating a public policy "against allowing pilots of airliners to operate aircraft while under the influence of alcohol."[61] The Eleventh Circuit affirmed.[62]

Proving a well-defined public policy against intoxicated pilots was a rather simple matter. The court cited forty state statutes prohibiting flying while intoxicated, including those of the origin and destination states of the Delta flight. The court also observed that federal regulations prohibit flying while intoxicated.[63]

What the court did not find was a well-defined public policy against hiring formerly intoxicated pilots. But the court reasoned that public policy was not only violated by flying drunk, but by the reinstatement of any pilot discharged for doing so:

> [w]here the person performs his employment duties and, *in doing so*, violates standards, restraints and restrictions on conduct, clearly and explicitly established by the people in their laws, a requirement that the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy.[64]

The problem here is that the court formulated its own second degree public policy. Under the court's analysis, an award violates public policy if it does not allow an employer to fire an employee who violates public policy. The actual policy that was violated by

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[59] *Delta Air Lines*, 861 F2d at 666-67.

[60] Id at 668.

[61] Id at 669 (quoting *Delta Air Lines v Air Line Pilots Ass'n*, 686 F Supp 1573 (ND Ga 1987)).

[62] Id at 675.

[63] *Delta Air Lines*, 861 F2d at 672-73.

[64] Id at 674 (emphasis in original).

the award was thus not one against flying drunk, but rather one against keeping an airline from discharging a pilot who did so. If this is indeed the relevant policy, then under *Misco* it must be "well defined and dominant." Without finding further support, the court simply assumed the amorphous policy against overturning discharges was part of the well-defined policy against flying drunk.

Note that the arbitration board found that the pilot had been effectively rehabilitated.[65] Would the board violate public policy by rehiring a sober pilot? The court recognized this inconsistency and attempted to resolve it by adding a qualification:

> There is no public policy against rehiring former alcoholics, post-rehabilitation. However, the arbitrator in this case was not authorized to decide whether, having been rehabilitated, [the pilot] should be rehired. The arbitrator's decision in this case was limited to whether Delta had just cause to discharge [the pilot], after he had flown an airplane while drunk, and before he had given the airline any indication that he was an alcoholic.[66]

Barring an arbitrator from making a decision about rehabilitation is contrary to *Misco*, which requires deference to an arbitrator's finding of remedies and amenability to discipline.[67] Such a limitation of an arbitrator's power to provide remedies would result in an absurd situation: if an arbitrator were to decide there is no just cause for discharge, he or she would be prohibited from reinstating an employee. Such a rule would be contrary not only to *Misco* but to the *Trilogy* as well.

Both *Delta Air Lines* and *Iowa Electric* seem to hold that it is the employee's act, not the arbitration award, that triggers the public policy exception. This broad view of *Misco* evades the requirement that an award itself violate public policy before it is reviewable. Both cases focus on the original safety violation. Consequently, both decisions, regardless of how satisfying their conclusions may be, are misapplications of *Misco*.

B. The Narrow View

A more strict application of *Misco* and the *Trilogy* can also produce undesirable results. In *Stead Motors v Automotive Ma-*

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[65] *Delta Air Lines*, 861 F2d at 668.

[66] Id.

[67] *Misco*, 484 US at 44-45.

chinists ("*Stead Motors II*"),[68] the Ninth Circuit upheld the reinstatement, after a four-month suspension, of an automobile mechanic who had been discharged for negligently failing to tighten wheel lug nuts. In *Stead Motors I*,[69] the first panel to hear the case followed *Iowa Electric* and defined the relevant public policy as a concern for safety on state roads.[70] The panel supported its opinion by looking to a California statute proscribing operating a vehicle in an unsafe condition[71] and by noting that the legislature had established the California Bureau of Automotive Repair[72] to regulate the automobile repair industry. Under Bureau regulations a dealer may lose its registration if an employee is guilty of gross negligence.[73] The panel affirmed the district court's ruling that had vacated the mechanic's reinstatement and back pay award on the ground that it violated public policy.[74]

On rehearing en banc, the court held that since the arbitrator did not violate public policy by reinstating the careless mechanic after a 120-day suspension, the award was consistent with the bargain of the parties to have an arbitrator evaluate "just cause."[75] Judge Reinhardt, writing for the plurality, emphasized that a court is, with few exceptions, bound to enforce an arbitration award, even when the court believes the award states facts and law erroneously.[76] He observed that this degree of deference is "unique" and "unparalleled," but explained that arbitration serves along with a collective bargaining agreement to maintain "equity and a balance of power in the workplace."[77] Even judges with the best of intentions must refrain from exceeding their "permissible scope of review."[78] A labor contract is merely a framework, and decisions of an arbitrator are designed to "fill in the gaps."[79] Such arbitration awards are part of the contract itself and must be enforced unless

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[68] 886 F2d 1200 (9th Cir 1989).

[69] 843 F2d 357 (9th Cir 1988) ("*Stead Motors I*"), reh'g granted, *Stead Motors v Automotive Machinists*, 857 F2d 682 (9th Cir 1988) (en banc), opinion withdrawn, different results reached on reh'g, *Stead Motors v Automotive Machinists*, 886 F2d 1200 (9th Cir 1989) (en banc).

[70] Id at 358-59.

[71] Id at 359 (citing California Vehicle Code § 24002).

[72] Id at 359 (citing California Automotive Repair Act, Calif Bus and Prof Code § 9882).

[73] Id (citing Calif Bus and Prof Code § 9884.7).

[74] Id at 358-59.

[75] *Stead Motors II*, 886 F2d at 1217.

[76] Id at 1204.

[77] Id at 1205.

[78] *Stead Motors II*, 886 F2d at 1204.

[79] Id at 1205.

voidable under law.[80] Consequently, "[j]udicial 'reinterpretation,' no less than judicial reformation of a contract against the wishes of all the parties to it, is ordinarily an invalid exercise of . . . power."[81]

The court recognized that arbitrators are generally not lawyers and are neither bound by precedent nor subject to reversal for factual or legal errors. They are "chosen for knowledge of the industrial 'shop' rather than any general knowledge of the law."[82] Proceedings are informal, and lack rules of procedure and evidence. Consequently, arbitration awards should not be expected to provide explicit detail for either findings of fact or rulings.[83] Presumably, if parties want the protection of procedural and evidential safeguards, they must bargain for them.

The court was critical of broad applications of the public policy exception because it provided lower courts with a tool for reversing awards they found objectionable. Public policy, under the rubric of *Grace*, had become "a favorite *pretext* for those less than favorably disposed to the awards of labor arbitrators."[84] The court adopted the narrow view, reading *Misco* to clarify *Grace* on this point.[85] Central to the court's holding was their formulation of a threshold question for applying the public policy exception: is there a well defined public policy barring reinstatement? This inquiry, the court asserted, is often neglected:[86]

> Simply put, a public policy *in favor of or against what*? In our view, only one answer comports with *Misco*, and with our narrow rule. If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*. Courts cannot determine merely that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the finding of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy. In our view, a faithful reading of *Misco* requires something more. A court must both delineate an overriding public policy rooted in something more than "general considera-

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[80] *Stead Motors II*, 886 F2d at 1205-06.

[81] Id at 1206.

[82] Id.

[83] Id (citing *Enterprise Wheel*, 363 US at 598).

[84] *Stead Motors II*, 886 F2d at 1210 (emphasis added).

[85] Id at 1211.

[86] Id at 1212.

> tions of supposed public interests," and, of equal significance, it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator.[87]

By choosing a narrow construction, the court refused to follow the "hard" cases of *Iowa Electric* or *Delta Air Lines*, which it distinguished because of the many lives at risk.[88] *Iowa Electric* was also distinguished because the strict regulation of the nuclear power industry could point to a clear public policy barring reinstatement of anyone caught breaking a safety rule. However, the court reserved judgment as to whether the actual NRC regulations involved in *Iowa Electric* would be sufficient to establish such a policy.[89] The court also noted that the NRC's explicit approval of the machinist's discharge might be construed as a well defined expression of a public policy barring reinstatement.[90] *Delta Air Lines*, on the other hand, did not need to be distinguished because it was inconsistent with the reading of the public policy exception in *Northwest Airlines v Air Line Pilots Association*,[91] where agency action—FAA recertification of a pilot after alcohol rehabilitation—led the District of Columbia Circuit to uphold the pilot's reinstatement.[92]

In a concurring opinion, Judge Wallace objected to Judge Reinhardt's inference of amenability to discipline when the award was silent on the issue. He reasoned that if amenability to discipline can be found when an award is silent, then determination of public policy is effectively given to the arbitrator in cases where future conduct is involved.[93]

Judge Reinhardt's analytical approach provoked a strong dissent from Judge Trott, who focused on public health and safety concerns and the institutional role of the court. The dissent questioned whether a court should stand by and allow lives to be endangered and further questioned the rule of strict deference when facts indicate that an employee is unrepentant and unlikely to respond to discipline.[94] Judge Trott criticized the narrow interpreta-

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[87] *Stead Motors II*, 886 F2d at 1212-13 (footnotes omitted) (emphasis in original).

[88] Id at 1214.

[89] Id.

[90] Id at 1214-15.

[91] 808 F2d 76 (DC Cir 1987).

[92] Id at 83.

[93] *Stead Motors II*, 886 F2d at 1227 (Wallace concurring in part, dissenting in part).

[94] Id at 1224 (Trott dissenting).

tion of the public policy exception as being "like a column of correct numbers added up improperly."[95]

The dissent pointed out that the reinstated mechanic was anything but repentant. He had been formally warned of his recklessness in tightening lug nuts on a prior occasion.[96] This warning accused the mechanic of "gross negligence."[97] Less than a year later, he once again argued with his superior about proper lug nut tightening procedures. Subsequently, the mechanic's inattention to detail caused seven out of ten nuts to loosen and one nut to fall off when a customer drove home from the repair shop. The mechanic insisted he could not have been responsible even though, according to the work order, he was the only employee who had worked on the car.[98]

In the discussion section of the reinstatement award, the arbitrator observed:

> Grievant knew the requirements of this particular job function. He also knew of the potential danger to life and safety and the potential consequences thereof to the Employer. . . . Grievant's failure to tighten the lug [nuts] . . . constituted recklessness which warranted discipline . . . .
>
> In addition, at the arbitration hearing, Grievant was unduly argumentative and he attempted repeatedly to justify and excuse his conduct. His behavior did not assist his cause.[99]

Reinstatement of such an employee poses a distinct problem for a federal court asked to enforce such an award. "No wonder the district court refused to sanction this travesty," remarked Judge Trott. "It would be one thing for the parties themselves to get together privately and agree on such an unpalatable result, but it is another altogether for a federal court to put its imprimatur on such a disaster."[100]

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[95] *Stead Motors II*, 886 F2d at 1217.

[96] Id at 1218. The court quoted the arbitrator's warning:

> After installing the left rear tire, you failed to properly tighten the lug [nuts] which caused all but 2 of the [nuts] to fall off. The 2 remaining [nuts] came so loose that the wheel almost came off while this owner was driving at highway speeds in San Francisco.

[97] *Stead Motors II*, 886 F2d at 1218.

[98] Id at 1218-19.

[99] Id at 1219.

[100] Id.

The dissent attacked the court's narrow view for "chok[ing] the 'public policy' exception . . . into oblivion."[101] It suggested that a broad rule, which would allow striking down an award that endangers public safety, "gives life to the public policy exception rather than suffocating it beyond resuscitation."[102] Rejecting as "bromidic" Judge Reinhardt's observation that "all of us suffer when potentially productive workers are relegated to unemployment," the dissent insisted this "is scarcely a response to the threat of public safety."[103] The waste to the public of a reckless worker being discharged does not balance with the peril to public health and safety from reinstatement. Only a broad view would allow such a balancing test. Thus the dissent felt this case was proper for application of the public policy exception:

> Accidents happen in the blink of an eye. Danger appears out of nowhere, sinking ships, downing planes, and sending cars out of control. . . . I do not believe that deference to arbitration, a concept with which I wholeheartedly agree, suffers at all if the judiciary retains the right to keep arbitrators within the bounds of public policy; nor do I think that *Misco* compels the excessively "hands-off" policy adopted today in this circuit.[104]

The crucial distinction between the court and the dissent in *Stead Motors II* is one of timing. The court, reading *Misco* as allowing an arbitrator to prescribe punishment or rehabilitation, looks to public policy implications only after an award has been given. The dissent, on the other hand, looks to the original act and does not examine the specific award, but asks whether arbitration should receive deference if public safety has been put at risk. The problem with the dissent's view is that it implies that arbitration is meaningless; presumably only final awards that matched the opinion of the reviewing court would be affirmed. The implications of this broad view go beyond the *Trilogy*, *Grace* and *Misco* by questioning whether, where health and safety are at risk, an arbitration award should receive deference at all.

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[101] *Stead Motors II*, 886 F2d at 1221.

[102] Id at 1222.

[103] Id.

[104] Id.

IV. A Public Safety Standard of Review

The public safety applications of *Misco* present a dilemma. The reckless employees in *Iowa Electric*, *Delta Air Lines* and *Stead Motors II* hardly provoke sympathy. Each acted in manifest disregard of public safety. Yet in none of these cases did an arbitrator find such egregious conduct sufficient for dismissal. Under a narrow public policy exception, none of these awards may be questioned; any court doing so would just be substituting its view for the arbitrator's. Only a broad reading of *Misco* allows judicial review of reinstatements when public health and safety has been placed at risk. Unfortunately, as argued above, the broad view misapplies the standard of review laid out in *Misco* and could lead to the ultimate demise of arbitral finality in public safety cases.

In none of the cases above is there any conclusive evidence that the reinstated employee had been rehabilitated or sufficiently deterred from his or her reckless behavior. The pilot in *Delta Air Lines* was treated for alcohol abuse, but the court cited no evidence to support the arbitration board's finding that the alcohol rehabilitation program had "effective results."[105] The machinist in *Iowa Electric* was reinstated because of the arbitrator's erroneous determination that he did not know the seriousness of violating nuclear containment.[106] The auto mechanic in *Stead Motors II* consistently acted with deliberate and willful obstinance to a rudimentary safety measure: tightening a nut; even during grievance proceedings, he was argumentative and unrepentant.[107]

Although the *Trilogy* does not require that an arbitrator write a clear opinion,[108] in each of these cases there was a written opinion with facts that could support a reasonable finding by a reviewing court that discharge would have been proper. Nevertheless, under *Misco* a court is forbidden to make an inquiry into a reinstatement award that does not directly violate public policy. The arbitrator is given the sole power of deciding remedies, regardless of whether these awards are silly, inadequate, or in serious error.[109]

One question that must be addressed is why a court should be required to enforce an award that arguably increases the probability of harm to the public. Certainly, the problem is not speculative. Newspapers are filled with accounts of airplane

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[105] See *Delta Air Lines*, 861 F2d at 668.

[106] *Iowa Electric*, 834 F2d at 1426.

[107] *Stead Motors II*, 886 F2d at 1219 (Trott dissenting).

[108] See text accompanying notes 12-14.

[109] See text accompanying notes 30-39.

crashes and train wrecks that have been attributed to either employee recklessness or substance abuse.[110]

A court should allow arbitration of public health and safety issues, but should enforce only those reinstatement awards that are supported by a detailed record providing evidence that future employee safety violations will be unlikely. When an arbitrator offers inadequate written support for an award, it is proper for a court to remand the case for subsequent factfinding. If, after remand, the court still finds no consideration of public health and safety, then the reinstatement should be overturned. This argument rests on the premise that public safety interests outweigh the purposes of strict arbitral finality; industrial peace need not be attained at the price of innocent lives.

By giving undue deference to erroneous awards, *Misco* provides no workable standard to protect the public from an increased risk of harm. Instead, courts should adopt an alternative public safety standard of review: when an employee has been discharged for conduct that has substantially put public health and safety at risk, an arbitration award reinstating such an employee should be upheld only when the evidence supports a finding that the employee will be unlikely to commit dangerous acts in the future. In the case of employee recklessness, an award must show, at a minimum, that the employee realized the severity of his or her act, regretted its occurrence and will be responsive to the prescribed sanction. Similarly, in the case of a substance abuser, an arbitrator should evaluate an offered treatment program and hear evidence on success rates. The arbitrator should also prescribe a monitoring procedure, to ensure that the employee has been rehabilitated prior to reinstatement, as well as periodic random testing.

This standard would ease strict deference to unsupported arbitral determinations of an employee's amenability to discipline. It is unreasonable to require a court to defer to an unsupported award when the facts contradict finding that the employee in question will act responsibly in the future. Recidivism is a key issue here. Psychological and substance abuse problems are complex, and an arbitrator's reinstatement should not be read as a magic wand that cures the affliction. Unless an arbitrator is an expert in drug rehabilitation, for instance, there could be danger in blindly deferring to his or her uninformed opinion.

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[110] Even substance abuse without injury has been newsworthy. See, for example, *Airline Fires Pilots Over Drinking Episode*, Chicago Tribune 1-3 (Mar 17, 1990) (three Northwest Airlines pilots fired for having blood-alcohol levels exceeding federal regulations).

The framework of this public safety standard of review draws on Professor Gould's argument that judicial review in public policy cases should be premised on evidence in a written arbitration opinion:

> [W]here predominant public policy considerations are involved, the arbitrator, notwithstanding what the Court said in *Enterprise Wheel* about the fact that arbitral opinions are not required in the labor arena, should cite chapter and verse with reference to the record as to the potential for and actuality of rehabilitation, and the basis for the arbitrator's conclusion that reinstatement is appropriate under the circumstances.[111]

When a record lacks factfinding, Gould proposes that an arbitration award should be vacated, although he indicates that remand might be appropriate in some circumstances.[112] Gould's rule may be unjust, however, because it presumes that an employee is dangerous until proven otherwise. Under such a rule, discharge might be upheld in a case where an arbitrator's opinion omits the fact that the employee has been successfully rehabilitated. While such an unjust outcome may be possible, at least Gould's standard errs on the side of safety.

Gould's proposal goes too far, however, by suggesting that state legislatures mandate written opinions in all situations.[113] Gould argues that this should only be a slight burden because labor and management already expect well-reasoned opinions.[114] Yet Gould does not address the potential problem of federal preemption that might arise if a state enacted such a rule.

In contrast, the standard proposed by this Comment does not require a sweeping change in the structure of state labor law and does not risk federal preemption. Instead of requiring an opinion by force of law, this standard simply provides a requirement of evidentiary support for arbitrators who do not wish to be overturned. Although a complete and detailed opinion would be most helpful to a reviewing court, it should not be required. Rather than automatically vacating an award because there is no written opinion, a court need only examine the record to see if an award is ade-

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[111] William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworkers Trilogy: *The Aftermath of* AT&T *and* Misco, 64 Notre Dame L Rev 464, 491-92 (1989).

[112] Id at 492 n 112.

[113] Id at 492-93.

[114] Id at 493.

quately supported by evidence, thus avoiding the problem of unjustly discharging a successfully rehabilitated employee. The crucial determination in public safety reinstatements is whether an employee has been sufficiently deterred or effectively rehabilitated—not whether an arbitrator, who need not be an attorney, has written a legal opinion sufficient for court scrutiny.

To apply the public safety standard of review, a moving party seeking to overturn an award must prove two assertions. First, the party must show that the employee's conduct presented a serious risk to the public. Second, the party must show that the arbitration award inadequately ensured "the potential for and actuality of rehabilitation."[115] By making the endangerment of public safety the threshold, the number of cases that would meet this standard should be limited, making it narrower than the general public policy exception. Thus narrowed, the standard serves public interests without unduly invading upon arbitral autonomy in other situations. General public policy concerns should still be resolved under *Misco*, which balances public needs with the state interest in the finality of labor arbitration. Only when lives are placed at risk should the present system be set aside.

Although Congress declared an interest in labor arbitration in section 203(d) of the Labor Management Relations Act ("LMRA"),[116] it also stated in the LMRA declaration of policy that "employers, employees, and labor organizations" should "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices that jeopardize the *public health, safety, or interest.*"[117] Arbitration, when it is the bargained-for method of contract interpretation, is an integral part of the relationship between the parties. Thus, while parties may allow an arbitrator to adjudicate public safety issues, any award that does not protect public interests is not covered by the LMRA, and hence subject to review by the courts.

Judicial review of safety awards does not conflict with the rationale of the *Trilogy*, which is premised upon the idea that an expert arbitrator, knowledgeable in the "common law of the shop" would be better able than a court to understand complex industrial relations. Public safety is not an issue about which most arbitrators have any special expertise; safety awards do not require the same degree of deference as do plant-related issues. Nor would ju-

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[115] Gould, 64 Notre Dame L Rev at 492.

[116] LMRA § 203(d), 29 USC § 173(d) (1982).

[117] LMRA § 1(b), 29 USC § 141(b) (1982) (emphasis added).

dicial review interfere with industrial peace. Few unions would insist upon reinstating a demonstrably dangerous employee.[118]

The public safety standard of review provides important incentives to employees, employers and arbitrators. First, it provides an incentive to employees to take care that they do not endanger the public. By knowing that he or she will not be protected by final labor arbitration, an employee will seek to avoid reckless acts. Second, because discharging potentially dangerous employees may reduce tort liability exposure, this standard provides employers with added incentive to monitor employee activities. Often an employer will be in the best position to detect employee recklessness through either direct observation or information from supervisors and fellow employees. Under the present rule, an employer could be forced to take back a reckless employee. This may be very costly, unless the employee can be diverted to a less risky job. Third, this standard gives arbitrators an incentive to require psychological input prior to making crucial reinstatement decisions. For example, if an employee who was discharged for using crack cocaine can be shown by independent expert evaluation to be cured of her addiction, then an arbitrator may reinstate that employee, subject to subsequent monitoring. When such evidence is not available, however, an arbitrator will know that the award is likely to be overturned. An arbitrator who is frequently overruled will be less likely to be hired; consequently, he or she will take more care in supporting reinstatement determinations.

One might reasonably expect this public safety standard of review to be criticized on a number of grounds. First, it can be argued that such a rule puts a great burden on the arbitral process. Expert witnesses and monitoring costs are expensive. However, in spite of the difficulties in administering the rule, the burden to the public from rehiring an employee who has a significant chance of backsliding into substantially dangerous behavior clearly outweighs the demand for arbitral simplicity. In the modern world, the stakes are too high to validate an arbitrator's mere good faith belief that, for example, a twenty-year history of alcoholism can be successfully treated in six months or a year. To minimize error, the inquiry cannot cease at the end of the grievance proceeding. Since there is always a risk that the employee's misbehavior will continue, an arbitrator must provide for evaluation prior to reinstate-

[118] For example, the Air Line Pilots Association stated it had "no tolerance whatsoever toward drugs or alcohol in the cockpit." *Airline Fires Pilots*, Chicago Tribune 1-3 (cited in note 110).

ment and periodic evaluation thereafter. No other method can continually and adequately protect public interests.

Second, one of the primary concerns in proposing a standard based on a malleable concept such as public policy or public safety is that it will seriously undermine arbitral finality. Commentators have criticized the public policy exception for setting forth a flexible standard under which courts may substitute their opinions for those of arbitrators.[119] Judge Harry T. Edwards noted the strategic advantages for an employer:

> Even if an employer knows that a particular public policy challenge is unwinnable, it can achieve substantial delay in implementing an award if it knows that the courts are generally solicitous of public policy claims. Arbitral finality will thus be significantly reduced, and unions will know that they will ultimately have to resort to strikes and other forms of economic warfare to settle their grievances. This would greatly disserve unions, employers and the public at large.[120]

The proposed standard of review affects only the limited number of grievances where an employee has substantially endangered the public. An employer would waste time and money by challenging an arbitrator's reward where a sober employee drove a delivery truck five miles over the speed limit on an open road. Although such a driver would have violated the law, it is unlikely the public would have been placed in significant peril. This type of case would be inappropriate for public safety review; under such circumstances, an arbitrator's reinstatement award should receive judicial deference. On the other hand, if an intoxicated driver ran a red light, the situation would provide a better case for an employer to argue against arbitral reinstatement on public safety grounds.

A final criticism of public safety review might be based on contract doctrine. If an employer can choose not to fire an employee who has violated public safety, should not an arbitrator be allowed to make this same decision? A court cannot force an employer to discharge an employee for dangerous conduct; it can only hold an employer liable should harm occur. One important distinction is that when an employer is liable in tort, it may internalize decisions by voluntarily retaining employees who may cause harm. The employer may weigh the costs and benefits of retaining the

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[119] See text accompanying notes 17-18.

[120] Edwards, 64 Chi Kent L Rev at 34 (cited in note 20) (footnotes omitted).

employee, knowing that if harm should occur, it will be held liable. On the other hand, when an employer is forced to retain a hazardous employee as a result of arbitration, it loses control over its own risk management.

CONCLUSION

In many modern industries a careless or substance-abusing employee may endanger countless lives. Newspaper accounts of airline crashes, oil spills and nuclear accidents bring this point home. Although the Supreme Court held in *Misco* that no arbitration award that violates public policy may be enforced by a court, at the same time the Court extended strict deference to erroneous, perhaps even silly, arbitral remedies. Paradoxically, when an employee has endangered the public as a result of job-related psychological impairment or substance abuse, an erroneous determination of the employee's potential for rehabilitation violates any policy aimed at public health and safety. By placing rehabilitation solely in the hands of an arbitrator, *Misco*, as applied to public safety cases, prevents a court from examining an arbitrator's reasons for returning a potentially dangerous employee to work.

Courts seeking to vacate reinstatements that jeopardize public safety have molded the public policy exception to make it apply in particular cases. As an alternative, this Comment provides a principled standard for a court seeking to review the arbitral reinstatement of an employee who has been discharged for dangerous conduct. Reinstatement of such an employee should only be enforced when supported by evidence of rehabilitation and accompanied by a provision for future monitoring. The rule of strict deference may place protection of the public solely in the hands of an arbitrator hired by private parties for his or her expertise in industrial matters. Providing an exception to this rule when public safety is implicated would lend a second level of scrutiny which would minimize erroneous awards and, consequently, increase public health and safety.